

November 30, 2022

Dora Marquez
Insurance Adjuster
Golden Fleece Insurance Company

Re: Claimant: Carla Palmer
Fleece Insured: Regina Lakes
D/Loss: December 29, 2020

Dear Ms. Marquez:

The purpose of this letter is to provide you with our opinion on whether we must defend and/or indemnify Golden Fleece Insurance Company Homeowner's Policy No. Q86-75309 issued to Greg Lake ("Lake") with Regina Lake ("Regina") as a named insured.

Statement of Facts

Golden Fleece received notice on December 31, 2020, of a variety of claims brought by Carla Palmer ("Carla") against the named insured, Regina. The question presented is whether we must defend and/or indemnify Regina for the claims asserted against her in this lawsuit, or whether Golden Fleece can permissibly deny coverage altogether?

At all times pertinent to the allegations of the lawsuit Regina was the named insured under the Golden Fleece Homeowners Policy. Under that policy, Golden Fleece agreed to provide Regina with liability protection relating to bodily injury, property damage and personal injury. The relevant provision of the policy read as follows:

HOME AND FAMILY LIABILITY PROTECTION – SECTION II

OUR PROMISE—Bodily Injury and Property Damage Liability Coverage

We will pay all sums up to the amount shown on the Declarations which anyone we protect becomes legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence during the policy period. We will pay for only bodily injury or property damage covered by this policy.

OUR PROMISE—Personal Injury Liability Coverage

"We" will pay all sums up to the amount shown on the "Declarations" which "anyone we protect" becomes legally obligated to pay as damages because of "personal injury" caused by an offense committed during the policy period. "We" will pay for only "personal injury" covered by this policy.

Elsewhere, the policy provides the following definitions:

"anyone we protect" means you and the following residents of your household:

1. relatives and wards;
2. other persons in the care of anyone we protect.

"bodily injury" means physical harm, sickness or disease, including mental anguish or resulting death, but does not include:

1. any communicable disease or condition transmitted by anyone we protect to any other person through a parasite, virus, bacteria or any other organism.
2. the exposure to or transmission of any disease, parasite, virus, bacteria or other organism by anyone we protect to any other person.

"occurrence" means an accident, including continuous or repeated exposure to the same general harmful conditions.

"personal injury" means injury arising out of:

1. Libel, slander or defamation of character;
2. False arrest, wrongful detention or imprisonment, malicious prosecution, racial or religious discrimination, wrongful entry or eviction, invasion of privacy, or humiliation caused by any of these.

Finally, the policy contains the following pertinent exclusions:

We do not cover under Bodily Injury Liability Coverage, Property Damage Liability Coverage, Personal Injury Liability Coverage and Medical Payments To Others Coverage:

1. Bodily injury, property damage or personal injury expected or intended by anyone we protect even if:
 - a. the degree, kind or quality of the injury or damage is different than what was expected or intended; or
 - b. a different person, entity, real or personal property sustained the injury or damage than was expected or intended

9. Except as provided in paragraph 2. C. under "What We Do Not Cover – Bodily Injury Liability Coverage, Property Damage Liability Coverage, Personal Injury Liability Coverage and Medical Payments To Others Coverage" bodily injury, property damage or personal injury which arises out of the sexual molestation, corporal punishment or physical or mental abuse by anyone we protect

10. Personal injury arising out of a willful violation of a law or ordinance by anyone we protect.

11. Suits for libel, slander or defamation of character made against "anyone we protect" if the publication or statement:

a. was knowingly untrue.

12. Punitive or exemplary damages and related defense costs.

On December 29, 2020, Carla filed a complaint against Regina, her biological mother and named insured under Golden Fleece's Homeowners Policy. The Complaint is pled in six counts. The first two counts assert claims only against the Estate of Lake. But the last four counts assert claims against Regina including claims for RICO Violations under 18 U.S. Code §1962(D) (Count III); Misprision of a Felony Under 18 U.S. Code § 4 (Count IV); Civil Conspiracy (Count V); and Intentional Infliction of Emotional Distress (Count VI). The relevant facts are as follows:

Carla alleges that she was sexually abused by Lake, Regina's ex-husband, beginning when she was 11 years old, and Lake was 52. Regina knew about Lake's abuse and control over Carla while she was a minor and would occasionally express concern about the relationship but refused to take any action in fear of tarnishing the family's reputation if Lake was convicted of raping and sexually abusing a minor. Plaintiff claims Regina was aware of and helped her husband conceal the abuse. Regina obtained a dissolution of her marriage to Greg in 1999, but the plaintiff alleges that they continued to act as husband and wife, and that Regina retained control over her ex-husband's financial affairs.

Carla and Greg were never married, but had two children together. In 2012, when Carla was 32 years old, she left Greg. Carla claims that her mother Regina (who was acting on behalf of her ex-husband Greg) prepared an "Agreement for Support and Settlement" ("Agreement") in May 2012 that was signed by Carla and by Greg, a copy of which is appended to the Complaint. Carla alleges that "[t]he agreement provided that in exchange for Plaintiff's silence about the years of abuse, Defendant Greg would support their kids 'in any need that arises, such as tuition', until the youngest reaches the age of twenty-five, which would be on or about 2027." Greg passed away on April 8, 2020. The agreement also provides in part that "Greg and Carla affirm that they will not bring up, nor will they take part in bringing up, any matters from the past."

Applicable Law

A. Duty to Defend & Indemnify

Undoubtedly, the duty to defend is broader than the duty to indemnify.¹ In Ohio, the Supreme Court adopted the "expanded scope of the allegations test," which provides as follows:

It follows that the pleadings alone may not provide sufficient factual information to determine whether the insurer has an obligation to defend the insured. It remains true that where the pleadings unequivocally bring the action within the coverage afforded by the policy, the duty to defend will attach. [Citation omitted].

¹ *Charter Oak Ins. Co. v. Maglio Fresh Food*, 45 F. Supp. 3d 461, 465 (E.D. Pa. 2014), *aff'd sub nom. Charter Oak Ins. Co. v. Maglio Fresh Foods*, 629 F. App'x 239 (3d Cir. 2015).

However, where the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage had been pleaded, the insurer must accept the defense of the claim. Thus, the “scope of the allegations” may encompass matters well outside the four corners of the pleadings.

City of Willoughby Hills v. Cincinnati Ins. Co., 9 Ohio St. 3d 177, 180 (1984) [quotations omitted].

In contrast, the duty to indemnify “hinges on the insured's *actual liability* to the claimant and *actual coverage* under the policy.” *Grange Ins. Ass'n v. Roberts*, 179 Wash. App. 739, 751, 320 P.3d 77, 85 (2013). In sum, if there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend. Once an event triggers the duty to defend, insurers may not desert policyholders while awaiting an indemnity determination. The obligation encompasses any claim that might be covered under any permissible construction of the policy. *Grange Ins. Ass'n v. Roberts*, 179 Wash. App. 739, 752, 320 P.3d 77, 86 (2013) [quotations omitted].

B. Coverage A: Bodily Injury and Property Damage

Golden Fleece’s insurance policy provides that the insurers will pay those sums the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” which is caused by an “occurrence.”

An occurrence, as defined in the policy, means an accident, including continuous or repeated exposure to the same general harmful conditions. While accident is undefined, Ohio courts have defined ‘accident’, generally, as an “unusual, unexpected and unforeseen event.... An accident is never present when a deliberate act is performed unless some additional unexpected, independent, and unforeseen happening occurs which produces the damage.... To be an accident, both the means and the result must be unforeseen, involuntary, unexpected, and unusual.” *State Bancorp, Inc. v. U.S. Fid. & Guar. Ins. Co.*, 199 W. Va. 99, 105, 483 S.E.2d 228, 234 (1997). It follows that the definition of an “occurrence” does not include actions which are *intended* by the insured.²

Here, the Complaint raises factual allegations and pleadings that suggest coverage may exist in the form of liability stemming from bodily injury. Importantly, courts have held that coverage does not, facially, extend to the claim of civil conspiracy in the event of a third-party claim against an insured which implicates liability coverage related to bodily injury. *See State Bancorp, Inc. v. U.S. Fid. & Guar. Ins. Co.*, 199 W. Va. 99, 106–07, 483 S.E.2d 228, 235–36 (1997) (“There is a conscious, decision-making element that takes civil conspiracies out of the range of behavior encompassed within the meaning of an ‘occurrence’”). However, in contrast, courts have held in cases concerning claims stemming from factual allegations regarding sexual assault of a minor that when a policy covering bodily injury defines that term to include “mental anguish” without any restriction to physical injury, then an ambiguity is created which must be

² *Id.* at 235.

construed in favor of the insured. *Snell v. Katafias*, No. 17440, 1999 WL 148229, at *4 (Ohio Ct. App. Mar. 19, 1999).

In *Gearing v. Nationwide Ins. Co.*, the court concluded that “incidents of intentional acts of sexual molestation of a minor do not constitute ‘occurrences’ for purposes of determining liability insurance coverage, as intent to harm inconsistent with an insurable incident is properly inferred as a matter of law from deliberate acts of sexual molestation of a minor. The public policy of the state of Ohio precludes issuance of insurance to provide liability coverage for injuries produced by criminal acts of sexual misconduct against a minor.” 1996-Ohio-113, 76 Ohio St. 3d 34, 40. Accordingly, it appears from *Gearing*, that at some point where harm appears to have been objectively certain, we no longer ask whether the insured subjectively intended the resulting harm. *Snell v. Katafias*, No. 17440, 1999 WL 148229, at *7 (Ohio Ct. App. Mar. 19, 1999).

Relatedly, “[u]nder the inferred intent rule, intent to injure is inferred as a matter of law from the act of sexual abuse of a child itself, as harm is deemed inherent in the sexual molestation, regardless of the offenders expression of subjective intent, and regardless of whether the sexual abuse was ‘nonviolent’ or unaccompanied by penetration, or whether the abuse took place over a long or short period of time.” *Gearing v. Nationwide Ins. Co.*, 1996-Ohio-113, 76 Ohio St. 3d 34, 37, 665 N.E.2d 1115, 1117.

Here, the Complaint alleges claims and/or factual allegations which implicate an obligation to provide coverage under bodily injury provisions, such as the Infliction of Emotional harm. Per this claim, the allegations suggest that Regina had actual knowledge of the abuse – therefore, coverage may be barred under the Intentional Act Exclusion. While Regina did not herself conduct the sexual abuse, her facilitation and knowledge thereof may implicate her. Accordingly, under the inferred intent rule, the Complaint suggests Regina intentionally acted in an effort to conceal the sexual abuse by creating an Agreement acknowledging the occurrences of such events, evidenced by the signatures of both Lake and Carla. However, it is a mere allegation that Regina faces in being implicated in such Agreement, despite her name and signature remaining absent from the document entirely. Accordingly, while the Complaint itself suggests intentional conduct and actual knowledge of illegality, it remains ambiguous as to Regina’s actual knowledge as her name and signature remains absent from any documents evidencing the case of such events.

C. Coverage B: Personal Injury

In the world of liability insurance, personal injury coverage applies to injury which arises out of the commission of certain enumerated acts or offenses.... [c]overage thus is triggered by the offense, not the injury or damage which a plaintiff suffers. *State Bancorp, Inc. v. U.S. Fid. & Guar. Ins. Co.*, 199 W. Va. 99, 108 (1997) [quotations omitted]. Relevantly, Golden Fleece’s insurance policy defines “personal injury” as injury arising out of: “(1) Libel, slander or defamation of character; (2) False arrest, wrongful detention or imprisonment, malicious prosecution, racial or religious discrimination, wrongful entry or eviction, invasion of privacy, or humiliation caused by any of these.”

Here, the Complaint references four claims against Regina – however, none of these claims expressly fall under the covered offenses in the personal liability provision. The factual allegations of the Complaint, however, suggest the occurrence of wrongful detention or imprisonment, invasion of privacy, and humiliation. Moreover, the date of the alleged offenses referenced in the factual allegations, implicating personal liability coverage, were committed during the policy period. Accordingly, “where the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage had been pleaded, the insurer must accept the defense of the claim.” *City of Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St. 3d 177, 180, 459 N.E.2d 555, 558 (1984). Therefore, a duty to defend, at this stage in the analysis, may exist due to the ambiguity in factual allegations giving rise to coverage. However, an exclusion may apply to bar coverage, and thus, the duty to defend.

Accordingly, it is well recognized that coverage is excluded for injury intentionally caused by the insured.³ Additionally, Golden Fleece’s insurance policy provides several exclusions for personal injury coverage. Specifically, an important exclusion provided by the policy limits coverage for personal injury arising out of a willful violation of a law or ordinance by anyone we protect. Thus, “an insurer has no duty to defend where the acts alleged of an insured fall outside the scope of policy coverage.” *Gearing v. Nationwide Ins. Co.*, 1996-Ohio-113, 76 Ohio St. 3d 34, 41, 665 N.E.2d 1115, 1120.

The factual allegations establish a plausible basis for coverage and thus, implicate a potential duty to defend. However, the same facts coupled with the pertinent claims levied against Regina, specifically “Misprision of a Felony”, facially preclude coverage by virtue of the claim itself establishing Regina’s willful violation of law in possessing knowledge of the existence of a crime and concealing it thereof. *See Gearing v. Nationwide Ins. Co.*, 1996-Ohio-113, 76 Ohio St. 3d 34, 39, 665 N.E.2d 1115, 1119 (finding that the nature of the claim itself implicates intent and therefore precludes coverage). Thus, despite the ambiguity raised in the factual allegations as to the applicability of liability coverage, the pleadings establish that the acts alleged in the Complaint fall outside the scope of policy coverage. However, the duty to defend in Ohio is broad and the nature of the claims presents ambiguity which creates an arguable existence of coverage, and thus, potential duty to defend.

D. Damages

The Complaint seeks compensatory and punitive damages, in addition to attorney fees and equitable relief. Importantly, the policy provides an exclusion for punitive or exemplary damages and related defense costs. Moreover, as mentioned, both Coverage A and B will be excluded were the policyholder found to have acted intentionally and/or knowingly in the alleged claims. Many factual and legal claims exist which implicate Regina’s intentional conduct, as well as, her actual knowledge in facilitating illegalities – thus, coverage would be barred. However, in the event litigation persists, “public policy prevents insurance contracts from insuring against claims for punitive damages based upon an insured's malicious conduct.” *Neal-Pettit v. Lahman*, 2010-

³ *Allied World Nat. Assur. Co. v. Great Divide Ins. Co.*, 140 A.D.3d 103, 109, 32 N.Y.S.3d 72, 76 (2016)

Ohio-1829, ¶ 21, 125 Ohio St. 3d 327, 331. Thus, it is our opinion that Golden Fleece is unlikely to incur liability related to Regina's claims requesting the award of damages, as her conduct creates an inference of intentionality, despite her actual knowledge, which will bar coverage and thus preclude Golden Fleece's obligation to indemnify.

Conclusion

In conclusion, it is suggested that Golden Fleece defend under Reservation of Rights as both the bodily injury and personal liability provisions present ambiguities in coverage that would be easily resolved through the discovery process allotted by such invocation. For example, the intentional act exclusion would bar most, if not entire, coverage of Regina's claim were Regina's involvement in coordinating the creation of the Agreement confirmed through discovery tools such as depositions. Moreover, coverage may be barred by the suggestion of Regina's inferred intent in the physical, financial, and emotional abuse suffered by her daughter, Carla, as a result of Regina's concealment and facilitation of sexual abuse of a minor by her husband throughout their marriage. Accordingly, it is recommended that Golden Fleece defend under a Reservation of Rights letter to preserve any and all defenses that will arise once discovery commences.

If you have any questions, please do not hesitate to call me at (xxx) xxx-xxxx.

Very truly yours,

Rebecca Feliciano